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April 15, 2008

VIA ELECTRONIC FILING

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E. Street, SW
Washington, DC 20423

Dear Secretary Quinlan:

Pursuant to 49 C.F.R. 1110.4 and the Board's Notice in SIB L.N. Parte No. 677, Common Carrier Obligation of Railroads, served February 22, 2008, Transportation Arbitration and Mediation, P.L.L.C. of Washington, DC, offers the following comments:

Sincerely yours,


Fritz R. Kahn

SURFACE TRANSPORTATION BOARD
WASHINGTON, DC

STB Ex Parte No. 677

COMMON CARRIER OBLIGATION OF RAILROADS

COMMENTS
OF
TRANSPORTATION ARBITRATION AND MEDIATION, P.L.L.C.

Transportation Arbitration and Mediation, P.L.L.C. of Washington, DC, pursuant to the Notice of Public Hearing, served February 22, 2008, offers the following comments:

Introduction

It is somewhat disheartening that the Board should have felt the need to hold a public hearing to determine the common carrier obligation of the Nation's railroads. One would have thought that the matter was well settled and to require no further explication.

Railroads, of course, are common carriers. They were deemed to be common carriers even before they were regulated. The Cullum Report,¹ which led to the enactment of the railroads' Federal regulation, observed, "Railroads are everywhere recognized as common carriers." The Act to regulate commerce of 1887, which established the Interstate Commerce Commission, by its terms applied to "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad" The railroads subject to regulation by the Board continue to be common

¹ Report of the Senate Select Committee on Interstate Commerce, 49th Cong., 1st Sess (1886), at p. 39.

carriers.. The ICC Termination Act of 1995.² defined a "rail carrier" as "a person providing common carrier railroad transportation for compensation . . ."

Saying that a railroad subject to Board regulation is a common carrier, however, provides no answer to the question who is a common carrier. The Cullum Report, supra, after stating that railroads universally were recognized as common carriers, went on to state:

In his work on "Common Carriers" Chitty says

The common carrier is defined to be one who by the ancient law held, as it were, a public office, and was bound to the public, and who to become liable as a common carrier must exercise the business of carrying as a public employment and must undertake to carry goods for all person indiscriminately and hold himself out as ready to engage in the transportation of goods for hire as a business and not as a casual occupation

Justice Story defines a common carrier as one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place.

The Supreme Court in The Tapline Cases, 234 U.S. 1, 24 (1914), stated.

[T]he extent to which a railroad in fact is used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character.

The ICC in Star Grain & Lumber Co. v. A. T. & S. F. Ry. Co., 17 I.C.C. 338, 334 (1909), declared.

It is sometimes said that the essential characteristic of a common carrier is that it holds itself out as such to the world, and in a certain class of cases some such test has been applied; and where there is a shipping world to which it may hold itself out as a common carrier and which it may serve in that capacity the test suggested may be a proper one

And, again, the ICC in Manufacturers Ry. Co. v. St. L. & S. Ry. Co., 21 I.C.C. 304.

² Pub. L. 104-88, 109 Stat. 803, 806 (1995), 49 U.S.C. 10102(5)

312 (1911), said, "The test to be applied in determining whether a person is a common carrier really is whether he holds out, either expressly or by a course of conduct, that he will, so long as he has room, carry for hire the goods of every person indifferently who will bring goods to him to be carried [citation omitted]."

The definition of a common carrier has not changed in the intervening years. In STB Finance Docket No. 34502, American Orient Express Railway Company LLC--Petition for Declaratory Order, served December 29, 2005, aff'd sub nom. American Orient Express Ry. Co. v. S I B, 484 F.3d 554 (D.C. Cir. 2007), the Board held:

"There is no statutory definition of the term 'common carrier.' However, as a general matter, the term 'common carrier' is a well-understood concept arising out of common law, and it refers to a person or entity that holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation [citations omitted]."

The railroads' holding out is not constant but may increase as articles of commerce are added to the railroads' traffic mix. The ICC, in Coma v. St. L.-S.F. Ry. Co., 74 I.C.C. 400, 407 (1922), noted that "[t]he courts, both State and Federal, have with practical unanimity held that a railroad company is not required as a common carrier to transport circus trains." In Transportation of Circuses and Show Outfits, 299 I.C.C. 330, 334 (1956), however, the ICC cautioned, "Whether a carrier, in undertaking to transport circuses or show outfits, acts as a common carrier or as a private carrier is a question of fact in each case to be determined when the issue is presented for decision." Similarly, in U.S. v. Pennsylvania R. Co., 242 U.S. 208, 236 (1916), the Supreme Court held that railroads were under no obligation as common carriers to transport oil in tank cars. In General American Tank Car Corp. v. El Dorado L. Co., 308 U.S. 422, 431 (1939), however, the Supreme Court concluded that the railroads which failed to provide tank

cars for the bulk transportation of oil could pay allowances to shippers which themselves provided the leased or owned tank cars for the oil's bulk transportation. A railroad, however, cannot refuse to transport freight which it has held itself out to transport. In Lake-and-Rail Butter and Egg Rates, 29 I C C. 45, 47 (1914), the ICC agreed with the protestants who maintained:

Under the act the carrier has no right to election as to the commodities it will carry. One carrier is required to carry the same classes of traffic as every other carrier, and it can not evade its statutory duty by restricting its profession. The carrier is obliged to furnish the necessary transportation and facilities defined by the act of a shipment offered, if the goods are fit for transportation.

While the identification of railroads as common carriers may not have changed, their regulation most certainly has.

The most glaring example is the sweeping exemption from regulation of most merchandise traffic handled by the railroads. One seriously cannot dispute that the railroads remain common carriers of fresh fruits and vegetables, lumber and paper products or machinery and manufactured products. The railroads continue to hold themselves out to carry these commodities, and, with rare exceptions, they have adequate equipment and facilities required for their transportation. Yet the ICC, availing itself of the provisions of 49 U.S.C. 10505(a) (now 49 U.S.C. 10502(a)), declared these and a whole host of other commodities to be exempt from regulation. See, Rail Exemption - Lumber or Wood Products, 7 I.C.C. 2d 673 (1991), Rail Exemption - Misc. Manufactured Commodities, 6 I.C.C. 186 (1989); Ex Parte No. 436 (Sub No.2), Rail General Exemption Authority--Miscellaneous Commodities, served March 24, 1980).

Having been declared exempt from regulation, such commodities no longer need be transported by the railroads. As the Board conceded in SIB Finance Docket No.

33989, Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries--Petition for Declaratory Order, served May 15, 2003:

The exemption of a commodity under 49 U.S.C. 10502 generally excuses carriers from virtually all aspects of regulation involving the transportation of that commodity. This includes the dual requirements that a carrier furnish rates and provide service on reasonable request pursuant to those rates [footnote omitted]

To be sure, pursuant to 49 U.S.C. 10502(d), the Board is empowered partially to revoke the regulatory exemption of a commodity and to require its transportation by the railroads in accordance with their holding out, but neither the Board nor the ICC as yet has found the circumstances which it deems warrant granting a shipper such relief. See, i.e., STB Ex Parte No. 346 (Sub-No. 25B), General Exemption Authority--Lumber or Wood Products--Petition for Partial Revocation, served July 27, 2005. Ex Parte No. 346 (Sub-No. 25), General Exemption Authority--Lumber or Wood Products, served May 15, 2003; No. 40774, American Rail Heritage, Ltd. d/b/a C1ab Orchard & Egyptian Railroad, et al. v. CSX Transportation, Inc., served June 16, 1995. Rail Exemption Misc. Agricultural Commodities, 8 I.C.C.2d 674 (1992), aff'd in part, rev'd in part. Mr. Sproul, Inc. v. U.S., 8 F.3d 118 (2d Cir. 1993).

A further regulatory change that has been effected is that, under 49 U.S.C. 10709(a) (formerly 49 U.S.C. 10713(a)), railroads now can enter into confidential rate agreements or contracts with their shippers to provide specified services under specified rates and conditions. According to some, that renders the railroads contract carriers. The court in State of Texas v. U.S., 730 F.2d 409, 424 (5th Cir. 1984), mistakenly said, "[R]ailroads are common carriers when they serve all comers at a general, public disclosed rate, and contract carriers when they enter into private contracts authorized by the Act." The Board itself, in its Decision in STB Ex Parte No. 669, Interpretation of the

Term "Contract" in 49 U.S.C. 10709, served March 12, 2008, declared, "Carriers, like shippers, argue that the Board should rely on the parties' intent in determining whether a rate is for common carriage or contract carriage [footnote omitted]" Section 10709(a) however, allows only "rail carriers" to enter into contracts, and, as noted above, 49 U.S.C. 10102(5) defines "rail carrier" as "a person providing common carrier railroad transportation for compensation." In other words, railroads remain common carriers notwithstanding that they may be rendering their services pursuant to confidential rate agreements or contracts with their shippers

Specific Questions

1. Railroads cannot escape their obligation to render service upon reasonable request by claiming capacity constraints. A railroad's alleged insufficient capacity to meet its shippers' needs was recognized from the inception of regulation as bearing upon the adequacy of the railroad's response to a reasonable request for service. In Brook-Rauch Mill & Elevator Co. v. St. L., L. M. & S. Ry. Co., 21 I.C.C. 651, 654 (1911), involving a claim of insufficient equipment, the ICC declared:

Section 1 requires carriers to establish through routes, to furnish cars for transportation upon reasonable request, to provide reasonable facilities for operating such through routes and reasonable regulations or practices with respect thereto.

* * *

We are of the opinion that the refusal by the defendants to furnish a car for the outbound movement of the shipment in question amounted to a failure to furnish transportation as required by the provisions of section 1 of the act. It was their duty to furnish such transportation and as a part thereof to supply the necessary services in connection with the transfer in transit of the shipment. There can be no doubt that their refusal to do so was the occasion of annoyance and expense to complainant, and operate to its prejudice. In this view we do not doubt that complainant's petition presents a case within our jurisdiction.

More recently, in GS Roofing Products Co. v. Surface Transp. Bd., 143 F.3d 387, 391 (8th Cir.1998), reversing, STB Docket No. 41230, GS Roofing Prod. Co., Inc., et al. v. Arkansas Midland R.R., et al., served March 5, 1997, the court held

The statutory common carrier obligation imposes a duty upon railroads to "provide [] transportation or service on reasonable request." 49 U.S.C. §11101(a). This duty reflects the well-established principle that railroads "are held to a higher standard of responsibility than most private enterprises." Thus, a railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable [citations omitted]

The court cited Ethan Allen, Inc. v. Maine Cent. R. Co., 431 F. Supp. 740, 743 (D. Vt. 1977), in which the court said, "A railroad may not, for example, justify a refusal to provide service solely on the grounds that to continue to provide the service would be inconvenient or less profitable."

Railroads have an obligation to respond to reasonable requests for service, and their alleged capacity constraints do not necessarily render their shippers' requests for service unreasonable.

2 Railroads have an obligation to transport hazardous materials It is too late in the day for the railroads to contend that they are not required to transport hazardous materials. The Transportation of Explosives Act³ authorized the ICC to prescribe rules and regulations governing the railroad transportation of explosives and other dangerous articles. See, Regulation for the Transportation of Explosives, 53 I.C.C. 533 (1919). The railroads continue to be under an obligation to transport hazardous materials. See, Docket No. 38302S, U.S. Department of Energy, et al. v. Baltimore & Ohio Railroad Company, et al., served August 25, 2005; Freight Rates on Radioactive Materials, East R., 362-I.C.C. 7556 (1980), aff'd, Consolidated Rail Corporation v. ICC, 646 F.2d 642

³ 35 stat. 1134, March 4, 1909

(D. C. Cir. 1981), cert. den., 454 U.S. 1047 (1981). If, as the Association of American Railroads advocates, chemical manufacturers should cease producing and tendering for railroad transportation certain hazardous materials, that's a matter for the industry to decide. Alternatively, if, as the AAR urges, the liability of the railroads should be limited in the case of accidents involving hazardous materials, especially toxic inhalants, by creating a statutory liability cap or enacting a Price-Anderson type solution, that's something for the Congress to enact. In the meantime, the railroads cannot escape their obligation to transport hazardous materials.

3 Railroads cannot require the shippers to make infrastructure investments

There can be no serious question that it is the obligation of the railroads at their expense to maintain their lines so as to enable them to render service upon reasonable request. Of course, the STB no longer is empowered to order the railroads to construct such facilities as are deemed required by the public convenience and necessity, as the ICC had been authorized to do by section 402 of the Transportation Act of 1920.⁴ It, however, is for the railroads to install and keep intact the tracks within their rights-of-way so as to be able to meet their shippers' reasonable requests for service. Indeed, in STB Finance Docket No. 35036, Suffolk & Southern Rail Road LLC--Lease and Operation Exemption--Sills Road Realty LLC, served October 12, 2007, the Board ordered a third party to cease and desist from constructing tracks on its premises which arguably were intended to be used as a line of railroad to be operated by a rail carrier. An extension or addition of a railroad line requires that the rail carrier secure the Board's advance authorization, pursuant to 49 U.S.C. 10901 or a declaratory order determination that no such approval is required. The

⁴ Pub. L. 66-152, 41 Stat. 476, February 28, 1920, codified at former 49 U.S.C. 1(21)

burden of securing the requisite regulatory approvals cannot be shifted to the railroads' shippers

4. Volume requirements and incentives should not be at the sacrifice of small shippers. Commodity rates published for volume shipments or as incentives for the movement of freight have been part of the railroads' pricing of their services from the very inception of regulation. In Kiser Co. v. Central of Georgia Ry. Co., 17 I.C.C. 430, 439-40 (1909), the ICC noted, "A commodity rate is generally lower than the rate applicable to the class from which the commodity is withdrawn, and is established because considerations other than relative ratings so require." Again, in Goerres Cooperage Co. v. C. M. & St. P. Ry. Co., 21 I.C.C. 1, 6 (1911), the ICC said, "Ordinarily a commodity rate is issued to provide for the movement of traffic which is believed by the defendants to require a lower rate than that provided by the general classification." And in Parkersburg Rig & Reel Co. v. C., R. I. & P. Ry. Co., 95 I.C.C. 181, 187 (1924), the ICC declared, "Commodity rates are ordinarily established when special treatment not afforded by the classification is required, and while heavy loading and volume of movement are not the only considerations in the establishment of commodity rates, they are important elements, which, other considerations being equal, may and frequently do become determinative."

Today unit-train rates largely have supplanted commodity rates as the means of pricing volume movements by rail carriers. In Increased Freight Rates and Charges, 1972, 341 I.C.C. 290, 373 (1972), the ICC observed:

Unit-train rates were established to reflect the economies of a specialized service in which the railroads are relieved of certain costs customarily associated with transportation. The shipper usually furnishes the cars which are generally of a larger capacity (100 tons) than standard coal cars, thus permitting more

efficient and economical operations. Loaded and empty cars are tendered to the carrier in a single lot. All intermediate switching is eliminated and there is a minimum of terminal switching as well as elimination of weighing expenses. Loading and unloading time is restricted, usually to between 4 and 10 hours, with increasing detention charges assessed for excesses. The shipper or consignee provides a substantial portion of the transportation service, such as cars, switching, tracks, and locomotives for within the plant operations, and loading and unloading facilities. Shipper personnel also coordinate movements and handle detailed paperwork.

Accord, Bituminous Coal, Within Eastern District, 346 I.C.C. 590, 593 (1974)

As attractive as unit-train movements may be to rail carriers, the railroads cannot offer unit-train service to shippers capable of tendering freight in such quantities to the exclusion of small shippers. In Milne Grain Co. v. Norfolk and W. Ry. Co., 352 I.C.C. 575, 584 (1976), the ICC cautioned:

[T]he mere fact that the railroad has assigned cars to unit-train service does not relieve it of its duty to oversee the overall impact of its car distribution practices. If unit-train shippers are receiving large numbers of cars in unit-train service, then this fact must be taken into account in the distribution of single cars.

In Experimental Piggyback Train Service, 356 I.C.C. 893, 908 (1977), the ICC amplified,

Section 1(11) [now 49 U.S.C. 11121(a)(1)] of the act places an affirmative duty on the railroads to establish and enforce just and reasonable rules, regulations, and practices with respect to car service. The railroad must maintain active control over its car distribution function to assure that all shippers are treated equitably. The mere fact that it would assign cars to unit-train type special service does not relieve the railroad of its duty to oversee the overall impact of its distribution practices. Thus, the railroad would have to ascertain that other shippers would not be unduly prejudiced in the event that it attempted to meet the car demand for the special trains by pulling them from other movements [citation omitted].

Whether the Board is paying much attention to the foregoing pronouncements of the ICC is something else again. Certainly, the operators of small country elevators which cannot tender grain shipments in unit-train quantities, among other shippers, have voiced their concerns that the rail carriers are failing consistently and timely to provide

them with the cars they need to market their products. This would appear to be contrary to the provisions of 49 U.S.C. 11121(a)(1) requiring rail carriers to enforce reasonable rules and practices on car service, but the Board generally is not understood to have afforded such small shippers the relief they seek.

5. Railroads are free to reduce their services so long as they fulfill their shippers' reasonable requests for transportation. The railroads always have been free to reduce the service on their lines. Such a reduction in service does not constitute an abandonment and does not require the Board's approval. In B. & M. R. R. Abandonment Branches, 105 I.C.C. 68, 74 (1925), the ICC dismissed an abandonment application where the railroad "has undertaken to continue operation of the lines with a reduced train service and plans to effect all possible economies in an endeavor to eliminate or materially reduce the losses from operations." In Weehawken Ferry Fares and Charges, 277 I.C.C. 95, 102 (1950), the ICC declared, "Matters with respect to curtailment of service are not within this Commission's jurisdiction since they do not constitute an abandonment within the meaning of section 1(18) of the Interstate Commerce Act [citation omitted]." Accord, Palmer v. Massachusetts, 308 U.S. 79, 85 (1939); Public Convenience Application of K. C. S. Ry., 94 I.C.C. 691, 692 (1925).

Indeed, the railroads at all times have been at liberty to remove tracks which they deemed to be unnecessary to the continuation of service on their lines. In Boston & M. R. Modifications of Systems, 311 I.C.C. 474, 475 (1960), the ICC noted, "[T]hat as long as service is not abandoned, the Commission has no jurisdiction over the removal of track. Similarly, in Boston & Albany R. Abandonment, 312 I.C.C. 458, 463 (1961), the ICC concluded that the removal of two of four multiple main line tracks "does not constitute

an abandonment of a line of railroad as contemplated by section 1(18)." "Such removal." the ICC continued, "therefore, is not within our jurisdiction."

This is not the time or the occasion to attempt to determine whether the railroads' rigorous tearing up of the second of hundreds of miles of double-tracked lines may not be the root cause of the service constraints that they currently are under. Unquestionably, the railroad had every right to do so and to curtail service when they believed that they could achieve needed cost savings by doing so. Their prior actions, however, do not excuse the railroads from presently providing their shippers transportation or service on reasonable request. Whether the railroads are providing adequate service to their shippers might be better determined by the Board from the publications of independent observers, such as Escalation Consultants, Inc., and from its occasional articles in Argus' Rail Business, rather than from the self-serving periodic reports filed by the railroads.

6 Embargoes should be allowed only as temporary emergency measures. An embargo is properly invoked, said the ICC in Coal from Arkansas and Other States, 49 I C C. 727, 731 (1918), "[w]here physical disabilities prevent the carriers from handling certain kinds of traffic for particular destinations, or where the consignees are unable promptly to accept delivery." The ICC in Murray v. Director General, 69 I C C. 477, 479 (1922), held, "an embargo is an emergency measure placed because of some disability on the part of the carrier which makes the latter unable properly to perform its duty as a common carrier." And in American Mfg. Co. v. Director General, 77 I C.C.52, 55 (1922), the ICC declared "Where physical disabilities prevent common carriers from handling certain kinds of traffic for particular destinations, we have recognized the carriers' right to declare embargoes."

The court in GS Roofing Products Co. v. Surface Transp. Bd. supra, 143 F.3d at 392, held:

A valid embargo will relieve a carrier of its obligation to provide service. An embargo is "an emergency measure placed in effect because of some disability on the part of the carrier which makes the latter unable properly to perform its duty as a common carrier." An embargo is generally a temporary measure that is issued at the carrier's election. Embargoes are typically valid if justified by physical conditions such as weather and flood damage, tunnel deterioration, or lack of equipment [citations omitted].

The Board pays lip service to the foregoing principles governing embargoes.

Thus, in STB Finance Docket No. 34236, Bolen-Brunson-Bell Lumber Company, Inc. v. CSX Transportation, Inc., served May 15, 2003, the Board declared:

Under 49 U.S.C. 11101(a), railroads have a common carrier obligation to provide service upon reasonable request. However, a carrier may temporarily embargo a line when physical conditions on the line preclude it from being able to operate safely over the line. An embargo temporarily excuses a carrier from its common carrier obligation, but the carrier must remove the embargo and restore safe service within a reasonable period of time.

Accord, Finance Docket No. 32821, Bar Ale, Inc. v. California Northern Railroad Co., et al., served July 20, 2001, STB Finance Docket No. 33386, Decatur County Commissioners, et al. v. The Central Railroad Company of Indiana, served September 20, 2000.

The Board, however, then turns around and determines that the validity of an embargo is dependent upon a number of economic factors. Thus, in its Bolen-Brunson-Bell Decision, the Board maintained, "Whether an embargo is reasonable, as well as how long an embargo may reasonably continue, is typically determined by considering various facts, such as: the cost of repairs necessary to restore service, the amount of traffic on the line, the carrier's intent, the length of service cessation, and the financial condition of the

carrier " See, also, the Bar Ale Decision and the Decatur County Commissioners Decision

The matters enumerated by the Board, however, are ones to be considered in a discontinuance or abandonment proceeding. If the amount of traffic on the line doesn't justify the cost of effecting the needed repairs, the railroad should seek the Board's authorization to discontinue rendering service on the line. If the carrier is in financial straits and really has no intention of rehabilitating the line, the railroad should apply to the Board for permission to abandon the line. As the court said in the GS Roofing Products Co., case, supra, 143 F.3d at 394.

Profitability of a railroad operation is proper consideration in determining whether public necessity and permit the granting of approval to abandon. Here, however, we are not dealing with a case in which the railroad is seeking to abandon a line. The sole question before the Board was whether [the railroad's] embargo was reasonable. An embargo may not be justified "solely on the grounds that to continue to provide service would be inconvenient or less profitable [citations omitted]"

An embargo is an emergency measure, and the Board should not allow the railroads to rely on embargoes of their lines to justify their avoidance of their obligation to render transportation or service on reasonable request. Although the decision was late in being rendered and well may have been the product of political pressure, the show-cause order which the Board entered in STB Finance Docket No. 35130, Central Oregon & Pacific Railroad, Inc.--Coos Bay Rail Line, served April 11, 2008, is a welcome affirmation of the foregoing standard.

7. The Board leaves it wholly in the railroads' discretion when to obtain its abandonment authorization. It is well settled that the Board has exclusive and plenary authority over the abandonment of railroad lines. Chicago & N.W. Tr. Co. v. Kalo Brick

& Title, 450 U.S. 311, 320-21 (1981). See also, Presault v. I.C.C., 494 U.S. 1, 9 (1990), Phillips Co. v. Denver and Rio Grande Western R., 97 F.3d 1375, 1377 (10th Cir. 1996). This has led the Board, or its predecessor, the ICC to hold that railroad lines cannot be abandoned without the agency's approval. Finance Docket No. 32518, The Phillips Company--Petition for Declaratory Order, served February 25, 1997. Long discontinued use of a railroad line -- as long as 30 years -- does not mean the line has been abandoned by the rail carrier or that the Board is without jurisdiction, upon receipt of a notice filing, to authorize its abandonment. STB Docket No. AB-33 (Sub-No. 132A), Union Pacific Railroad Company--Abandonment Exemption--in Rio Grande and Mineral Counties, CO., served May 24, 2000. A railroad's allowing one of its lines to fall into total disrepair requiring substantial rehabilitation before operations can be resumed does not mean that the line has been abandoned by the rail carrier or that the Board is without jurisdiction to authorize its conveyance to a new operator. STB Finance Docket No. 33508, Missouri Central Railroad Company--Acquisition and Operation Exemption--Lines of Union Pacific Railroad Company, served April 30, 1998. That some of the railroad line's tracks have been taken up and the track materials of portions of the line have salvaged does not mean that the line has been abandoned or that the Board, upon petition, is without power to authorize its abandonment. STB Docket No. AB-1081X, San Pedro Railroad Operating Company, LLC--Abandonment Exemption--in Cochise County, AZ, served April 13, 2006.

Thus, in the Board's view, in no instance does it become necessary for the railroads to obtain abandonment authorizations. The railroads are free to seek permission to abandon their lines whenever they chose to do so.

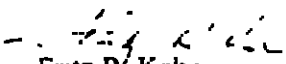
8. The common carrier obligation applies to all rail carriers. As detailed at the outset of this paper, railroads holding themselves out to engage in the for-hire transportation of freight in interstate or foreign commerce on tracks which are part of the general railroad system of transportation are common carriers. See, STB Finance Docket No 34094, Santa Clara Valley Transportation Authority--Acquisition--Union Pacific Railroad Company, served November 16, 2001. In other words, the common carrier obligation does not apply to railroads operating within the confines of industrial plants. Jackson Iron & Steel Co. v. Director General, 91 I C C 201-205 (1924), or to railroads which chose to service as contract operators performing switching inside industrial parks. Cf. STB Finance Docket No 34483, SMS Rail Service, Inc--Petition for Declaratory Order, served January 24, 2005.

9. The Board's Office of Compliance and Consumer Assistance performs a necessary function. The Office is available to entertain the alleged grievances of shippers believing themselves denied transportation or service by rail carriers upon reasonable request. No complaint is ignored. The Office makes a timely inquiry into every situation, without necessarily accepting the shippers' version as being altogether accurate or complete. The Office takes a balanced approach and endeavors to determine what the facts are and, in their light, offers its views as to what alternative solutions lawfully may be available. Thus, the Office greatly assists in resolving problems which, in the absence of the Office's participation, might lead to lengthy and costly litigation before the Board.

Respectfully submitted,

TRANSPORTATION ARBITRATION
AND MEDIATION, P.L.L.C.

By its attorney.


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Dated: April 15, 2008